IN THE

Supreme Court of The United States

OCTOBER TERM, 1976

No. 76-210

JANE SPIVEY,
Petitioner,
v.
STATE OF GEORGIA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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The State of Georgia, by and through the Attorney General of the State of Georgia, respectfully requests this Court to refuse to grant a Writ of Certiorari to the Georgia Court of Appeals on the basis that it is manifest that review of the State Court decision would present no substantial question not previously decided by this Court, and the State Court decision is in accord with the applicable decisions of this Court.

PART ONE

QUESTION PRESENTED

1.

Did the Georgia Court of Appeals apply the correct standard for harmless constitutional error in concluding that the admission of testimony about a statement by one of Petitioner's co-conspirators was harmless error, because the State's evidence also included testimony by two eyewitnesses and a confession made by Petitioner?

PART TWO

STATEMENT OF THE FACTS

Petitioner seeks to have this Court review the decision of the Georgia Court of Appeals in Spivey v. State, 138 Ga. App. 298, 226 S.E. 2d 104 (1976), which upheld her conviction for burglary. The Georgia Court of Appeals held that the admission of testimony about a statement by a co-conspirator of Petitioner's was harmless error because of other, overwhelming evidence of her guilt. The Georgia Supreme Court denied Petitioner's application for certiorari to review the lower appellate court's decision. Petition, appendix C.

Petitioner was convicted of burglary by a jury in Murray County, Georgia in June 1975 and received a sentence of three years imprisonment. At her trial, two persons also charged in the burglary testified as to her planning and their participation in the burglary of the residence of L. D. Spivey, Petitioner's former common-law husband. An agent of the Georgia Bureau of Investigation testified as to a statement made by Petitioner in which she admitted her involvement in the burglary. The State's case also included testimony by a police investigator about a statement by Larry Pack in which he implicated Petitioner in the burglary. Petitioner contends that there was harmful error of constitutional magnitude in the admission of the testimony about the statement by Pack who did not testify at her trial.

Gary Loggins testified at Petitioner's trial that she gave him and two other individuals instructions on the burglary of Mr. Spivey's trailer. (T. 70-72). Loggins testified that Petitioner promised to pay $500 for the burglary, and also asked the group to kidnap Mr. Spivey or to "shoot his legs off," offers which the hired burglars declined. (T. 70). Loggins testified further as to Petitioner's direction of the burglary, including her presence near the scene and her examination of the items taken after the burglary. (T. 76-78, 81-82).

Another eyewitness and participant in the burglary, Mike Shelton, testified about Petitioner's instructions on the burglary of Mr. Spivey's trailer. (T. 126-29). Shelton corroborated Loggins' testimony about Petitioner's expressed desire that her husband be physically harmed. (T. 130). Shelton testified that Petitioner and another woman were waiting for them after the burglary near the trailer. (T. 134-35).

Georgia Bureau of Investigation Agent Willard Dodd testified about two statements given to him by Petitioner on April 24 and April 25, 1975. (T. 150-63). In her first statement to Agent Dodd, Petitioner denied any involvement in the burglary. (T. 153-54). Petitioner was again advised of her rights and questioned about the burglary on the following day. (T. 156-58). In that statement she admitted having originated the plan for the burglary of Mr. Spivey's trailer and having talked to one Larry Pack about the execution of the burglary. (T. 158-59). Petitioner then described how she and her sister-in-law, Janie White, led Pack and the other individuals recruited for the burglary to the trailer. (T. 159-60). Petitioner also stated to Agent Dodd that she had examined certain items taken in the burglary. (T. 160).

Officer Edward McCumber of the Gordon County Sheriff's Department testified at Petitioner's trial about the statement given to him by Larry Pack on April 24, 1975. (T. 96-108). In Pack's statement, he described how Petitioner had approached him to recruit the other persons for the burglary. (T. 103-04, 107-08). Pack added that Petitioner had originally asked him to get someone to kill her former husband. (T. 103-04). At the time of Petitioner's trial, Larry Pack was a fugitive from both State and federal authorities. (T. 97-109). Murray County Deputy Sheriff James Crisp testified as to the efforts to locate Pack prior to Petitioner's trial. (T. 169-171).

The Georgia Court of Appeals upheld Petitioner's conviction and sentence, concluding that any error in the admission of McCumber's testimony about Pack's statement was harmless in view of the other evidence against Petitioner. Spivey v. State, 138 Ga. App. 298, 302, 226 S.E.2d 104 (1976). Citing this Court's decision in Dutton v. Evans, 400 U.S. 74, 86-87, 91 S. Ct. 210, 27 L.Ed.2d 213 (1970), the State court categorized the challenged testimony as "of peripheral significance at most" and not crucial or devastating. Spivey v. State, supra, 138 Ga. App. at 302.

PART THREE

REASONS FOR NOT GRANTING THE WRIT

A. THE STATE COURT'S CONCLUSION THAT THERE WAS NO HARMFUL ERROR IN THE ADMISSION OF THE CHALLENGED TESTIMONY IS IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT AND PRESENTS NO SUBSTANTIAL FEDERAL QUESTION FOR REVIEW.

The Georgia Court of Appeals concluded that the admission of officer McCumber's hearsay testimony about co-conspirator Pack's statement was erroneous because Pack's absence was directly attributable to "mishandling by the investigating authorities," presumably referring to Pack's release by the investigating officers without knowledge of his extensive prior criminal record. The Court concluded, however, that any error was harmless because of the other evidence against Petitioner, including the testimony of two co-defendant eyewitnesses and evidence of Petitioner's confession. In concluding that the error was harmless, the Court of Appeals cited Dutton v. Evans, 400 U.S. 74, 91 S. Ct. 210, 27 L.Ed.2d 213 (1970) and its own decision in Cauley v. State, 130 Ga. App. 278, 203 S.E.2d 239 (1973), cert. den. 419 U.S. 877. Spivey v. State, 138 Ga. App. 298, 302, 226 S.E.2d 104 (1976).

In Dutton v. Evans, supra, this Court found no denial of the right of confrontation in the application of the exception to the Hearsay Rule codified in Ga. Code § 38-306, which provides that "after the fact of conspiracy shall be proved, the declarations by any one of the conspirators during the pendency of the criminal project shall be admissible against all." In concluding that there was no constititutional deprivation under the circumstances presented, the Dutton court pointed out the strength of the State's evidence against the accused. Dutton v. Evans, supra, 400 U.S. at 87-88. The court also noted that the challenged statement was made under circumstances providing "indicia of reliability" because of its spontaneous nature and because it was against the penal interest of the declarant. Dutton v. Evans, supra, 400 U.S. at 89. In Petitioner's case the Georgia Court of Appeals based its decision primarily upon the strength of the other evidence against Petitioner, but also pointed out that the statement by Pack was spontaneous and was against his penal interest. Spivey v. State, supra 138 Ga. App. at 302-03.

While this Court's decision in Dutton v. Evans, did not specifically rely upon the concept of harmless constitutional error, the Georgia Court of Appeals' conclusion that the error in Petitioner's case was harmless is consistent with recent decisions of this Court which have held that "unless there is

a reasonable possibility that the improperly admitted evidence contributed to the conviction, reversal is not required." Schneble v. Florida, 405 U.S. 427, 432, 92 S. Ct. 1056, 31 L.Ed.2d 340, 345 (1972). In Cauley v. State, supra, the case cited by the Court of Appeals in Petitioner's case, the Georgia appellate court relied upon a number of this Court's decisions on harmless constitutional error. Cauley v. State, supra, 130 Ga. App. at 288, 290-93. In view of the overwhelming evidence of Petitioner's guilt, the Georgia Court of Appeals was fully justified in concluding that Petitioner was not substantially harmed by the admission of Officer McCumber's testimony. That conclusion is consistent with this Court's conclusion in the Schneble case that the jury "would not have found the State's case significantly less persuasive had the testimony . . . been excluded." Schneble v. Florida, supra, 405 U.S. at 432. Applying the test set forth in Schneble and in other decisions of this Court, the admission of the testimony challenged by Petitioner was harmless beyond a reasonable doubt.

B. BECAUSE THE GEORGIA COURT OF APPEALS APPLIED THE CORRECT TEST FOR HARMLESS CONSTITUTIONAL ERROR IN PETITIONER'S CASE, IT WOULD BE FUTILE TO REMAND THIS CASE TO THE STATE COURTS FOR RECONSIDERATION IN LIGHT OF THE GEORGIA SUPREME COURT'S RECENT DECISION IN CROWDER V. STATE, 237 Ga. 141 (1976).

In the supplement to her petition to this Court, Petitioner suggests that the case be remanded to the Georgia Court of Appeals for reconsideration in light of recent Georgia Supreme Court decision, Crowder v. State, 237 Ga. 141, __ S.E.2d __, decided June 29, 1976. Supplement to petition, appendix E. In Crowder, the Georgia Supreme Court found reversible error in the admission of a confession by a co-conspirator, deceased at the time of trial, in which he described how the defendant hired him to kill his wife. Citing a number of its previous decisions, the Court concluded that the statement was made after the termination of the conspiracy and that it was therefore inadmissible under Ga. Code § 38-414. Crowder v. State, supra, 237 Ga. at 150-54. The Crowder court rejected the argument of harmless error, concluding that there appeared a reasonable possibility that the improperly admitted evidence contributed to the conviction. The Court pointed out the vast difference between

the strength of the State's case with the inadmissible testimony and without it. "That difference gives rise to the reasonable possibility that (the) statement and confession contributed to the conviction." Id. at 155.

The factual distinction between Petitioner's case and the facts of Crowder v. State, supra, is readily apparent. For example, in Crowder there was no surviving eyewitness to the actual crime, nor was there any confession of guilt by the defendant. Crowder v. State, supra, 237 Ga. at 141-49. Moreover, the test for harmless error articulated by the Georgia Supreme Court in Crowder is identical to that relied upon by the Court of Appeals in Petitioner's case. The standard for determining harmless constitutional error as set forth in Crowder v. State, supra, and in Spivey v. State, supra, is based squarely upon decisions by this Court. Additionally, inasmuch as the Georgia Court of Appeals did find error in the admission of McCumber's testimony at Petitioner's trial, its conclusion on that point is wholly consistent with the Georgia Supreme Court's decision in the Crowder case.

Because the Court of Appeals' decision in Petitioner's case is consistent with the subsequent Georgia Supreme Court decision in Crowder v. State, supra, it would be futile to remand this case back to the Georgia courts for reconsideration.

CONCLUSION

This Court should refuse to grant a Writ of Certiorari to the Court of Appeals of Georgia, as it is manifest that no substantial federal question not previously decided by the Court is presented, and the State court decision is demonstrably in accord with the applicable decisions of this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this day served 3 copies of the foregoing Brief for the Respondent in Opposition upon Mr. A. Cecil Palmour, Attorney for Petitioner, Post Office Box 468, Summerville, Georgia, 30747, by depositing same in the United States mail, properly addressed with sufficient postage prepaid.

This _____ day of _____, 1976.

B. DEAN GRINDLE, JR.